

Comment

State v. Collins: Is the Impossible Now Possible in Ohio?

I. INTRODUCTION

The criminal law of the state of Ohio permits the imposition of criminal liability on persons who attempt, but do not complete, specified crimes.¹ Under the Ohio Revised Code, an attempt is a crime when an individual undertakes acts sufficient to commit a substantive crime with the requisite intent, but whose ultimate purpose is foiled, leaving the crime incomplete or unsuccessful.² Statutes such as Ohio's, which prohibit the crime of attempt, seek to punish individuals who have overtly acted upon their intent to commit a crime. The two primary justifications for criminal attempt liability are preventive arrests and the apprehension and judgment of a person who manifested a dangerous character.³

In *State v. Collins*,⁴ the Ohio Court of Appeals for the Sixth District held that the Ohio attempt statute, Ohio Revised Code section 2923.02, "does not expressly eliminate legal impossibility as a defense"⁵ to criminal attempts and thus, "legal impossibility remains a viable defense in Ohio."⁶ The court noted that neither the Ohio attempt statute nor its comments have any reference to "legal" impossibility.⁷ This finding is the basis for the court's ruling that the

1. See OHIO REV. CODE ANN. § 2923.02 (Baldwin 1986) (attempt statute).

2. *Id.* In paragraph one of the syllabus to *State v. Woods*, 48 Ohio St. 2d 127, 129, 357 N.E.2d 1059, 1061 (1976), the Ohio Supreme Court held:

A "criminal attempt" is when one person purposely does or omits to do anything which is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime. To constitute a substantial step, the conduct must be strongly corroborative of the actor's criminal purpose. (R.C. 2923.02[A] construed).

In *Woods*, the defendant and another defendant, Reaves, decided to rob the manager of a store when he left with the day's receipts. The defendants "cased" the premises but left after hearing a nearby fire engine. The court found the defendants' actions to plainly be a substantial step in a planned robbery and strongly corroborative of their criminal purpose. The court held there was no error in the trial court's finding that the conduct constituted attempted robbery. Justice Stern, writing for the majority, stated:

[R.C. 2923.02(A)] establishes that the essential elements of a criminal attempt are the *mens rea* of purpose or knowledge, and conduct directed toward the commission of an offense. . . . This court has held that the conduct necessary for a criminal attempt "need not be the last proximate act prior to the consummation of the felony."

Id. at 131, 357 N.E.2d at 1063 (quoting *State v. Farmer*, 156 Ohio St. 214, 216, 102 N.E.2d 11, 13 (1951)). As a result, the intent to commit a crime does not itself constitute an attempt, nor does mere preparation, but actions which manifest that intent are criminal attempts.

3. W. LAFAYE & A. SCOTT, CRIMINAL LAW 498 (2d ed. 1986).

4. C.A. No. L-87-319, slip op. (Ohio Ct. App., 6th Dist., Aug. 12, 1988) (LEXIS, Ohio library, Cases file), *appeal denied*, 40 Ohio St. 3d 706, 534 N.E.2d 849 (1988).

5. *Id.* at 3.

6. *Id.* at 4.

7. *Id.*

"legislature has remained silent on the defense of legal impossibility while rejecting factual impossibility."⁸

This Comment will first examine the historical background of the impossibility defense by considering the distinction made between "legal" and "factual" impossibility in criminal attempts. To better understand the intent of the Ohio legislature, this Comment will then consider judicial and legislative interpretations of section 5.01(1) of the Model Penal Code⁹ and section 110.10 of the New York Penal Law.¹⁰ This Comment will then assert that Ohio Revised Code section 2923.02¹¹ abrogates both common law defenses of legal and factual impossibility.

Specifically, this Comment suggests that the Ohio Court of Appeals' refusal to consider the totality of the circumstances surrounding the drafting of section 2923.02 was in direct contravention to the intent of the Ohio legislature and its Criminal Law Technical Committee. The court incorrectly approved legal impossibility as a defense to attempts, resulting in a defense not necessarily contemplated by the State, a conflict in the Ohio appellate courts, and a mandate for legislative action.

II. THE LAW OF IMPOSSIBLE ATTEMPTS

Impossible attempts have traditionally been distinguished as either "legal" or "factual" impossibilities based upon the intent of the defendant. Both types of attempts involve mistakes of fact by the defendant and not mistakes of law.¹² Legal impossibility is traditionally defined as a situation in which "the attemptor's intended act, if completed, would not be a crime."¹³ Factual impossibility, on the other hand, is traditionally defined as a situation in which "the intended substantive crime cannot be accomplished because of some physical impossibility."¹⁴ In other words, legally impossible attempts are instances where the defendant does everything he intended to do but does not commit the actual crime, while factually impossible attempts are cases where the defendant is unable to achieve his goal because of some fact unknown to him.¹⁵

8. *Id.*

9. MODEL PENAL CODE § 5.01(1) (Official Draft 1985).

10. N.Y. PENAL LAW § 110.10 (McKinney 1987).

11. OHIO REV. CODE ANN. § 2923.02 (Baldwin 1986).

12. See Note, *Mens Rea*, 83 COLUM. L. REV. 1029, 1053 (1983). Some commentators have mistakenly assumed that cases of legal impossibility involve mistakes of law and cases of factual impossibility involve mistakes of fact. See, e.g., Note, *Why Criminal Attempts Fail? A New Defense*, 70 YALE L.J. 160, 163 (1960) ("The only instance of legal impossibility . . . is one involving a clear 'mistake of law.'"). Courts have also erroneously relied on the mistake of law test. "Legal impossibility is said to occur where the intended acts, even if completed, would not amount to a crime. . . . The attempt [is a criminal offense] because both the intended consequence and the actual consequence are in fact criminal." *United States v. Berrigan*, 482 F.2d 171, 188 (3d Cir. 1973).

13. Elkind, *Impossibility in Criminal Attempts: A Theorist's Headache*, 54 VA. L. REV. 20, 21 (1968). See also Annotation, *Impossibility of Consummation of Substantive Crime as Defense in Criminal Prosecution for Conspiracy or Attempt to Commit Crime*, 37 A.L.R.3d 375, 382 (1971).

14. Elkind, *supra* note 13, at 21.

15. J.C. SMITH & B. HOGAN, CRIMINAL LAW 157-58 (1965); W. LAFAYE & A. SCOTT, *supra* note 3, at 511.

A. *Legal Impossibility*

The distinction between legal impossibility and factual impossibility is critical. In cases of legal impossibility, the defendant's mistaken belief of fact has the legal significance of preventing the completion of a crime. For example, a defendant offers a bribe to a person he believes to be a juror. The defendant knows that bribing a juror is a criminal offense. The person he is bribing, however, is not in fact a juror.¹⁶ The defendant here committed a legally impossible bribery attempt. Under the same rationale, when false testimony solicited by a defendant is immaterial to the case at hand and hence is not perjurious, the attempted subornation of perjury is legally impossible.¹⁷ Attempts have also been found to be legally impossible in instances when a defendant shot a stuffed deer, believing that it was alive,¹⁸ and when a convict secretly mailed letters from prison, believing that the warden was unaware of the letters.¹⁹

These cases all involve an intent to commit a crime and the erroneous belief of success on the part of the defendant. The defendant is not mistaken about the law governing his behavior, only the legal status of the goods or the individuals involved in the criminal attempt.²⁰ Traditionally, legal impossibility is a valid common law defense to the charge of criminal attempt.²¹

B. *Factual Impossibility*

In cases of factual impossibility, the defendant is unable to commit a crime because of a physical or factual condition unknown to him. Unlike legal impossibility, the defendant of a factually impossible attempt is frustrated by an intervening factual development and is unable to complete the criminal act itself.²² There is no mistaken belief about the legal status of the situation. For example, a defendant attempts to pick a pocket that he believes contains valuables. The pocket is, in fact, completely empty.²³ The defendant intended to commit the crime of theft, but was unable to achieve his goal because the factual circumstances were different than what he believed them to be. The most notable factual impossibility cases include a defendant shooting his wife with a gun he believed was loaded²⁴ and a defendant intending to shoot a victim but shooting an empty bed instead.²⁵ Generally, there is no factual impossibility defense at common law.²⁶

16. *State v. Taylor*, 345 Mo. 325, 133 S.W.2d 336 (1939); *State v. Porter*, 125 Mont. 503, 242 P.2d 984 (1952).

17. *People v. Teal*, 196 N.Y. 372, 89 N.E. 1086 (1909) (false testimony solicited was immaterial, so attempt was legally impossible).

18. *State v. Guffey*, 262 S.W.2d 152 (Mo. Ct. App. 1953).

19. *United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973).

20. *Elkind*, *supra* note 13, at 26.

21. *W. LAFAYE & A. SCOTT*, *supra* note 3, at 514.

22. *Id.* at 513.

23. *People v. Fiegelman*, 33 Cal. App. 2d 100, 91 P.2d 156 (1939); *People v. Moran*, 123 N.Y. 254, 25 N.E. 412 (1890); *Regina v. Collins*, 169 Eng. Rep. 1477 (1864).

24. *State v. Damms*, 9 Wis. 2d 183, 100 N.W.2d 592 (1960).

25. *State v. Mitchell*, 170 Mo. 633, 71 S.W. 175 (1902).

26. Annotation, *supra* note 13, at 381.

C. Attempts To Receive Stolen Property

In *People v. Jaffe*,²⁷ the defendant purchased goods he believed were stolen. In truth, the goods had been returned to their rightful owner and were used by the police to catch the defendant. The New York Court of Appeals reversed the defendant's conviction in this case on the grounds that his attempt was legally impossible because the necessary presence of mind was lacking. The court stated that "[n]o man can know that to be so which is not so in truth and in fact."²⁸ The court reasoned that the defendant only intended to receive the goods he received. Since the goods were not stolen, the defendant did not intend to receive stolen goods.²⁹ "If all which an accused person intends to do would if done constitute no crime it cannot be a crime to attempt to do with the same purpose a part of the thing intended."³⁰ Commentators who support the *Jaffe* legal impossibility approach to stolen property cases argue that the defendant is guilty only if the actual facts of the situation are consistent with his belief.³¹ If, as the *Jaffe* court stated, there can be no liability unless an unlawful act is performed, then there could never be inchoate liability because such liability is based on intent and on a legal act.³²

While several state courts have accepted a common law legal impossibility defense to an attempt to receive stolen property,³³ many commentators and several other courts have rejected the *Jaffe* rationale.³⁴ Instead, they focus on the specific intent of the defendant to commit the substantive offense. In *People v. Rojas*,³⁵ the California Supreme Court refused to follow the *Jaffe* rationale and further refused to consider the fine distinction between legal and factual impos-

27. 185 N.Y. 497, 78 N.E. 169 (1906).

28. *Id.* at 501, 78 N.E. at 170. The New York Court of Appeals specifically stated that there was no attempt by Jaffe because "knowledge being a material ingredient of the offense, it is manifest that it cannot exist unless the property has in fact been stolen or larcenously appropriated." *Id.* at 500, 78 N.E. at 170.

29. *Id.* at 501, 78 N.E. at 170.

"If what a man contemplates doing would not be in law a crime, he could not be said, in point of law to intend to commit the crime. If he thinks his act will be a crime, this is a mere mistake of his understanding where the law holds it not to be such, his real intent being to do a particular thing. If the thing is not a crime, he does not intend to commit one whatever he may erroneously suppose."

Id. (quoting 1 BISHOP'S CRIMINAL LAW § 742 (7th ed.)).

30. *Id.*

31. "If then the physical act intended is not a crime, the attempt to do it cannot be criminal." Beale, *Criminal Attempts*, 16 HARV. L. REV. 491, 494 (1903). See also Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 467 (1954); Perkins, *Criminal Attempt and Related Problems*, 2 UCLA L. REV. 319, 333-38 (1955).

32. See *Commonwealth v. Henley*, 504 Pa. 408, 416, 474 A.2d 1115, 1119 (1984) ("[A]n intent to commit an act which is not characterized as a crime by the laws of the subject jurisdiction can not be the basis of a criminal charge."); J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 595 (2d ed. 1960) (a defendant's intent to throw steak in the garbage is not punishable even if he believed that the act was illegal).

33. See, e.g., *Booth v. State*, 398 P.2d 863, 872 (Okla. Crim. App. 1964) ("[I]t is fundamental to our law that a man is not punished merely because he has a criminal mind. It must be shown that he has, with that criminal mind, done an act which is forbidden by the criminal law."); *People v. Rollino*, 37 Misc.2d 14, 233 N.Y.S.2d 580 (1962).

34. See *People v. Rojas*, 55 Cal. 2d 252, 358 P.2d 921, 10 Cal. Rptr. 465 (1961); *Darr v. People*, 193 Colo. 445, 568 P.2d 32 (1977); *Bandy v. State*, 575 S.W.2d 278 (Tenn. 1979). See also W. LAFAVE & A. SCOTT, *supra* note 3, at 515; Elkind, *supra* note 13, at 32-34 (endorsing the Model Penal Code approach); Robinson & Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983); Note, *Mens Rea*, *supra* note 12, at 1056-58.

35. 55 Cal. 2d 252, 358 P.2d 921, 10 Cal. Rptr. 465 (1961).

sibility. Instead, the court considered an attempt to receive stolen property as a mix of both factual and legal impossibility and found that the defendant's mistaken belief evidenced his criminal intent. The court stated that "[t]he fact the defendant was mistaken regarding the external realities did not alter his intention, but simply made it impossible to effectuate it."³⁶ This reasoning has been followed in cases where the defendant believed that the substance sold was an illegal drug,³⁷ that the man shot was actually alive,³⁸ and the cigarette smoked contained marijuana.³⁹

D. *Ohio's Common Law of Impossibility*

Very little case law exists in Ohio on either criminal attempts or impossibility defenses. The earliest case dealing with these subjects is *Williams v. State*.⁴⁰ In *Williams*, a fourteen-year-old was found guilty of attempted rape. The Ohio Supreme Court in ruling upon the impossibility of the defendant's attempt stated:

[T]he law is this: An infant under the age of fourteen years is presumed to be incapable of committing the crime of rape, or an *attempt* to commit it; but that presumption may be rebutted by proof that he has arrived at the age of puberty, and is capable of emission and consummating the crime.⁴¹

The substantive crime of rape thus could not be accomplished because of an intervening *physical impossibility*. Thus, the legal principle set down by the court established factual impossibility as a valid common law defense to criminal attempts in Ohio.

In *State v. Beal*,⁴² the Ohio Supreme Court reversed its prior ruling on the factual impossibility defense. In *Beal*, the defendant broke into a warehouse to steal money he believed was located in the warehouse safe. The safe, however, was empty. The *Beal* court stated that "[w]here a statute makes an assault upon a person with the intent to steal from his pocket, a criminal offense, it is no answer to an indictment charging such offense that nothing was found in the pocket."⁴³ This decision effectively eliminated the defense of factual impossibility. The *Beal* court was also asked to consider the distinction between "an attempt to commit a felony and an act done with intent to commit it."⁴⁴ In other words, the court was given the opportunity to rule on the validity of both the factual and legal impossibility defenses. However, the court opted to avoid the question because "[i]n the . . . case it [was] not necessary to examine the

36. *Id.* at 257, 358 P.2d at 924, 10 Cal. Rptr. at 468 (quoting J. HALL, GENERAL PRINCIPALS OF CRIMINAL LAW 127 (1947)).

37. *United States v. Quijada*, 588 F.2d 1253 (9th Cir. 1978); *State v. Lopez*, 100 N.M. 291, 669 P.2d 1086 (1983).

38. *People v. Dlugash*, 41 N.Y.2d 725, 363 N.E.2d 1155, 395 N.Y.S.2d 419 (1977).

39. *United States v. Giles*, 7 Crim. L. Rep. (BNA) 2259 (U.S.A.F. C.M.R. 1970).

40. 14 Ohio 222 (1846).

41. *Id.* at 227 (emphasis added).

42. 37 Ohio St. 108 (1881).

43. *Id.* at 111.

44. *Id.* at 111-12.

ground on which the distinction is said to rest."⁴⁵ This is the only Ohio Supreme Court case that specifically addresses the issue of legal impossibility. No other reported cases discussing this issue exist. Thus in Ohio, legal impossibility has never been recognized as a viable defense to criminal attempts.

Further evidence of Ohio's rejection of legal impossibility is the case of *State v. Ross*.⁴⁶ In *Ross*, the Ohio Appellate Court for the Third District rejected the notion that an attempt must fail in order for there to be a successful attempt prosecution. Failed attempts, as previously noted, are factually impossible attempts. The court stated that a defendant could be convicted of an attempt even upon proof that the crime attempted was consummated on the theory that the acts of the defendant involved an attempt to commit a crime.⁴⁷ Thus, if the intent of the defendant is the determinative factor of criminal offenses, it stands to reason that a defendant who attempts a legally impossible crime may be prosecuted under Ohio common law.

In addition, Ohio's common law provides that an attempt to commit a criminal offense requires that "intent to commit [the offense] must be present and . . . there must be some concomitant act or movement toward the execution of the purpose."⁴⁸ The Supreme Court of Ohio has consistently held that in an attempt to commit a felony it is not necessary that the act be the last proximate act prior to the consummation of the intended offense.⁴⁹ These principles focus on the intent of the defendant, and thus support the prosecution of legally impossible attempts.

III. STATUTORY ABROGATION OF IMPOSSIBILITY DEFENSES

A. *The Model Penal Code*

The drafters of the Model Penal Code intended to abolish the defense of impossibility in its entirety. The drafters noted that for there to be an attempted crime, the goal that the defendant acted upon must itself constitute a crime. They stated that "[i]f, according to his beliefs as to facts and legal relationships, the result desired or intended is not a crime, the actor will not be guilty of an attempt even though he firmly believes that his goal is criminal."⁵⁰ Under section 5.01(1) of the Model Penal Code, a criminal attempt is defined as follows:

A person is guilty of an attempt to commit a crime if acting with the kind of culpability otherwise required for commission of the crime, he:

45. *Id.* at 112.

46. 96 Ohio App. 157, 121 N.E.2d 289, *dismissed sua sponte*, 161 Ohio St. 408, 119 N.E.2d 618, *cert. denied*, 348 U.S. 846 (1954).

47. *Id.* at 164-65, 121 N.E.2d at 294. It should be pointed out that Ohio has long since had the offense of attempt, in particular, the crime of attempted statutory rape of young children. See *State v. Riddle*, No. 78 CA 131, slip op. (Ohio Ct. App., 5th Dist., Aug. 1, 1979) (LEXIS, Ohio library, Cases file) in addition to the *Ross* decision.

48. *State v. Farmer*, 156 Ohio St. 214, 216, 102 N.E.2d 11, 13 (1951). See also *Fox v. State*, 34 Ohio St. 377, 379 (1878).

49. *Farmer*, 156 Ohio St. at 216, 102 N.E.2d at 13.

50. Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 579 (1961).

- (a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or
- (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or
- (c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.⁵¹

According to the Revised Commentary to the Model Penal Code, "The 'circumstances' of the offense refer to the objective situation that the law requires to exist, in addition to the defendant's act or any results that the act may cause."⁵² Thus, a criminal attempt under the Model Penal Code is based on the "circumstances" that the defendant believed existed at the time he acted.⁵³ Applying this rationale to the case of an attempt to receive stolen property which is not in fact stolen, there is no question that a legal impossibility defense would fail. The conduct constitutes a crime under subsection (a) of 5.01(1) because the attempt would have been the actual crime of receiving stolen property if the property's legal status was what the defendant believed it to be. Unlike subsection (c), subsection (a) does not require the defendant's conduct to constitute a "substantive step" in the furtherance of the crime. As the Revised Commentary to the Model Penal Code states, "when . . . a person actually believes that his behavior will produce the proscribed result, it is appropriate to treat him as attempting to cause the result, whether or not that is his purpose."⁵⁴

The Model Penal Code reflects a conscious policy of focusing exclusively on the actor's subjective intent and belief in the area of legally impossible attempts. The commentary to section 5.01(1) states as follows:

Subsection (1) is also designated to reject the defense of impossibility . . . by providing that the defendant's conduct should be measured according to the circumstances as he believes them to be, rather than the circumstances as they may have existed in fact. . . . The approach [of the decisions holding a person accepting non-stolen goods not guilty of an attempt to receive stolen property] is unsound in that it seeks to evaluate a mental attitude . . . not by looking to the actor's mental frame of reference, but to a situation wholly at variance with the actor's beliefs.⁵⁵

This policy is based on the belief that individuals who have shown and acted upon their criminal propensities are a threat to society and should be subject to corrective action. As a result, eleven states have adopted attempt statutes based on the provisions and policies of the Model Penal Code.⁵⁶

51. MODEL PENAL CODE § 5.01(1) (Official Draft 1985).

52. *Id.* § 5.01 Revised Commentary, at 301 n.9.

53. *See id.*

54. *Id.* at 304.

55. *Id.* at 307-09. The purpose of this paragraph is to reverse the result in cases where attempt convictions have been set aside on the ground that it was legally impossible for the actor to have committed the crime contemplated.

56. ARIZ. REV. STAT. ANN. § 13-1001 (1978); ARK. STAT. ANN. § 5-3-201 (1987); CONN. GEN. STAT. ANN. § 53a-49 (West 1985); DEL. CODE ANN. tit. 11, § 531 (1987); HAW. REV. STAT. § 705-500 (1976); KY. REV. STAT. § 56.010 (Michie 1985); NEB. REV. STAT. § 28-201 (1979); N.H. REV. STAT. ANN. § 629.1 (1985); N.J. STAT. ANN. § 2C:5-1 (West 1982); OKLA. STAT. ANN. tit. 21, § 44 (West 1983); WYO. STAT. § 6-1-301 (1977).

These state statutes explicitly abolish all impossibility defenses. Other state courts have adopted the Model Penal Code by judicial fiat.⁵⁷ Although all of these states have specifically eliminated both legal and factual impossibility, they are not the only states to have enacted attempt statutes which deal with the elimination of impossibility defenses. Eighteen states, including Ohio, have adopted provisions modeled after both section 110.10 of the New York Penal Law and the Model Penal Code.⁵⁸ Many of these states based their attempt statute on the New York code rather than the Model Penal Code because they objected to the Model Penal Code's requirement that the substantive step necessary for culpability be one that "is strongly corroborative of the actor's criminal purpose."⁵⁹

B. *New York Penal Law Section 110.10*

The New York Penal Law attempt statute and analogous state statutes contain just one section which describes the conduct required for a criminal attempt. New York Penal Law section 110.00 states that "[a] person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime."⁶⁰ New York Penal Law section 110.10 then goes on to abolish the impossibility defense by stating that "it is no defense to a prosecution for such attempt that the crime charged to have been attempted was, under the attendant circumstances, factu-

57. See, e.g., *Young v. State*, 303 Md. 298, 493 A.2d 352 (1985); *State v. Latraverse*, 443 A.2d 890 (R.I. 1982). The court in *Latraverse* adopted the Model Penal Code by judicial fiat and the court in *Young* adopted the "substantial step" test of the Model Penal Code but did not include the objective considerations of the actor.

58. ALA. CODE § 13A-4-2 (1977); ALASKA STAT. § 11.31.100 (1989); COLO. REV. STAT. § 18-2-101 (1973); GA. CODE ANN. § 16-4-1 (1988); ILL. REV. STAT. ch. 38, para. 8-4 (1983); IND. CODE § 35-41-5-1 (1981); KAN. STAT. ANN. 21-3301 (1988); LA. REV. STAT. ANN. § 14.27 (West 1986); ME. REV. STAT. ANN. tit. 17-A, § 152 (1983); MINN. STAT. § 609.17 (1982); MO. ANN. STAT. § 564.011 (Vernon 1979); MONT. CODE ANN. § 45-4-103 (1983); N.D. CENT. CODE § 12.1-06-01 (1985); OHIO REV. CODE ANN. § 2923.02 (Baldwin 1986); OR. REV. STAT. § 161.405 (1985); 18 PA. CONS. STAT. ANN. § 901 (Purdon 1983); UTAH CODE ANN. § 76-4-101 (1978); WASH. REV. CODE § 9A.28.020 (1988).

59. Section 5.01(2) of the Model Penal Code provides:

(2) *Conduct That May Be Held Substantial Step Under Subsection (1)(c)*. Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negating the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:

- (a) lying in wait, searching for or following the contemplated victim of the crime;
- (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
- (c) reconnoitering the place contemplated for the commission of the crime;
- (d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
- (e) possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances;
- (f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;
- (g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

MODEL PENAL CODE § 5.01(2) (Official Draft 1985). According to the National Commission on Reform of Federal Criminal Laws, section 5.01(2) of the Model Penal Code has not been well received. See 1 NATIONAL COMM'N ON REFORM OF FED. CRIM. LAWS, WORKING PAPERS 361 (1970).

60. N.Y. PENAL LAW § 110.00 (McKinney 1987).

ally or legally impossible of commission.”⁶¹ The statute explicitly rejects the impossibility defense in both legal and factual impossibility cases. Unlike the Model Penal Code which treats factually and legally impossible attempts differently, the New York Penal Law treats all attempts similarly and subjects them to the same standard of intent.⁶²

Several of the states which follow the New York model have not specifically stated that both factual and legal impossibility are no longer defenses to an attempt. These states include Illinois, Indiana, Kansas, Montana, Ohio, Pennsylvania, and Wisconsin.⁶³

The Pennsylvania statute provides that “[i]t shall not be a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the offense attempted.”⁶⁴ Similarly, the Ohio statute states that “[i]t is no defense to a charge under this section that, in retrospect, commission of the offense which was the object of the attempt was impossible under the circumstances.”⁶⁵ These statutes incorporate language from both the Model Penal Code and the New York statute. They eliminate the impossibility defense in cases where “the defendant would have committed a crime had the circumstances been as he believed them to be.”⁶⁶

Cases decided under the Illinois and Pennsylvania form of the New York statute have held that this type of impossibility statute was actually intended to abrogate both factual and legal impossibility defenses. The explicit statement that impossibility is not a defense operates to eliminate all impossibility defenses, not just factual impossibility. In *Commonwealth v. Henley*,⁶⁷ the defendant was charged with attempted theft. The goods were not actually stolen, so the defendant raised the defense of legal impossibility. The Pennsylvania Supreme Court, however, rejected his claim that the legislature intended to retain legal impossibility as a viable defense since it did not expressly eliminate it.⁶⁸ The court stated that the defendant’s conduct should be evaluated in terms of the circumstances that the defendant thought existed rather than those that

61. *Id.* § 110.10.

62. Section 110.00 of the New York Penal Law statute provides: “A person is guilty of an attempt to commit a crime when, with intent to commit a crime he engages in conduct which tends to effect the commission of such crime.” *Id.* § 110.00. Section 110.00 is New York’s general attempt provision which makes all attempts a criminal offense. Section 110.10 of the New York Penal Law statute is the attempt provision which addresses the issue of attempts and impossibility defenses. It states as follows:

If the conduct in which a person engages otherwise constitutes an attempt to commit a crime pursuant to section 110.00, it is no defense to a prosecution for such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission, if such crime could have been committed had the attendant circumstances been as such person believed them to be.

Id. § 110.10. For purposes of this Comment, § 110.10 will be referred to as the New York attempt statute.

63. See ILL. REV. STAT. ch. 38, para. 8-4 (1983); IND. CODE § 35-41-5-1 (1981); KAN. STAT. ANN. § 21-3301 (1981); MONT. CODE ANN. § 45-4-103 (1983); OHIO REV. CODE ANN. § 2923.02 (Baldwin 1986); 18 PA. STAT. ANN. § 901 (Purdon 1983); WISC. STAT. ANN. § 939.32(2) (1982).

64. 18 PA. CONS. STAT. ANN. § 901 (Purdon 1983).

65. OHIO REV. CODE ANN. § 2923.02(B) (Baldwin 1986).

66. Robbins, *Attempting the Impossible: The Emerging Consensus*, 23 HARV. J. ON LEGIS. 377, 435 (1986).

67. 504 Pa. 408, 474 A.2d 1115 (1984).

68. *Id.* at 415, 474 A.2d at 1118.

actually existed.⁶⁹ Furthermore, in *People v. Elmore*,⁷⁰ the Illinois Appellate Court for the Fourth District held that the Illinois attempt statute was intended to codify the abrogation of factual and legal impossibility. These two decisions are representative of the modern trend of courts to abolish impossibility under general attempt provisions.⁷¹ They support a similar ruling in Ohio and indicate that the court of appeals in *State v. Collins*⁷² did not adequately consider the intent of the Ohio legislature when it adopted an attempt statute patterned after the New York and Pennsylvania models.

IV. THE LEGAL SIGNIFICANCE OF *STATE V. COLLINS*

A. *The Facts of Collins*

In *Collins*, defendants Donald R. Collins, Arthur M. Sobb, and Allen Sobb were indicted by a Lucas County grand jury. Counts two, four, six and seven of the indictment charged the defendants, separately, with attempted receiving of stolen property in violation of Ohio Revised Code sections 2913.51 and 2923.02. On July 17, 1987, counsel submitted an "Agreed Statement of Facts" that the property received in the four above-mentioned counts was neither stolen nor obtained through the commission of a theft offense.⁷³ Counsel for defendants filed a motion to dismiss the four counts on the ground that those counts failed to charge defendants with crimes under the Ohio Revised Code. On August 31, 1987, the Lucas County Court of Common Pleas granted the defendants' motion to dismiss stating that legal impossibility was a defense because the property was not stolen.⁷⁴ The court held that Ohio Revised Code section 2923.02 eliminated the defense of factual impossibility but did not abrogate the defense of legal impossibility for criminal attempts.⁷⁵

On appeal, the State argued that the trial court failed to recognize that the offense of criminal attempt is based on the intent of the defendant and that criminal attempts can apply to the defendant's state of mind. The State also

69. *Id.*

70. 128 Ill. App. 2d 312, 261 N.E.2d 736 (1970), *aff'd*, 50 Ill. 2d 10, 276 N.E.2d 325 (1971). Paragraph 8-4(b) of chapter 38 of the Illinois Revised Statutes provides that "[i]t shall not be a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the offense attempted."

71. See, e.g., *Darr v. People*, 193 Colo. 445, 568 P.2d 32 (1977); *Armstrong v. State*, 429 N.E.2d 647, 653 (Ind. 1982); *Zickefoose v. State*, 270 Ind. 618, 388 N.E.2d 507 (1979); *State v. Logan*, 232 Kan. 646, 656 P.2d 777 (1983); *State v. Bird*, 285 N.W.2d 481 (Minn. 1979). In *Logan*, the Supreme Court of Kansas rejected the argument that the Kansas attempt statute only applied to factual impossibility and held that the defendant could be convicted of attempted theft even though the property that was taken had not actually been stolen. *Logan*, 232 Kan. at 650, 656 P.2d at 780. The Kansas statute provides that "[i]t shall not be a defense to a charge of attempt that the circumstances under which the act was performed . . . were such that the commission of the crime was not possible." KAN. STAT. ANN. § 21-3301(b) (1981). The Kansas statute is substantially similar to OHIO REV. CODE ANN. § 2923.02(B) (Baldwin 1986).

72. C.A. No. L-87-319, slip op. (Ohio Ct. App., 6th Dist., Aug. 12, 1988) (LEXIS, Ohio library, Cases file), *appeal denied*, 40 Ohio St. 3d 706, 534 N.E.2d 849 (1988).

73. See Brief of Plaintiff-Appellant at 1, *Collins*, C.A. No. L-87-319, slip op.; Brief of Defendant-Appellees at 1, *Collins*, C.A. No. L-87-319, slip op. (briefs on file with the Ohio State Law Journal).

74. *State v. Collins*, No. CR87-6059, slip op. at 11 (Lucas County Ct. C.P., Aug. 31, 1987) (opinion on file with the Ohio State Law Journal).

75. *Collins*, C.A. No. L-87-319, slip op. at 4.

argued that the Ohio Revised Code does not require a fine distinction between legal and factual impossibility. Instead, the State asserted that the controlling factor of the statute is the requirement that the defendant intend to commit a substantive offense.⁷⁶

The Lucas County Court of Appeals for the Sixth District rejected the State's arguments and by a Decision and Journal Entry filed August 12, 1988, it affirmed the judgment of the trial court.⁷⁷ The Ohio Supreme Court refused to hear the case and on December 14, 1988, it granted defendants' motion to dismiss for lack of jurisdiction.⁷⁸ As a result of the Ohio Supreme Court's refusal to review the *Collins* decision, a conflict now exists among the state courts of appeal over the question of whether legal impossibility is abrogated by the general attempt statute.⁷⁹

B. Ohio Revised Code Section 2923.02

In *Collins*, the Court of Appeals for the Sixth District considered whether the Ohio statute for attempted receiving stolen property⁸⁰ read in conjunction with the state's general attempt provision⁸¹ afforded defendants an impossibility defense. The court addressed two substantive issues: (1) whether the statutory language of the Code abrogates the defense of legal impossibility and (2) whether the legislature intended to eliminate all impossibility defenses. While the court acknowledged the modern trend of abrogating legal impossibility, it ignored the language of the statute, the intent of the legislature, its Criminal Law Technical Committee, and other Ohio appellate decisions which state that legal impossibility is eliminated by Ohio Revised Code section 2923.02.⁸²

76. Brief of Plaintiff-Appellant at 3-4, *Collins*, C.A. No. L-87-319, slip op. The State's assignment of error in its brief reads: "The trial court erred in the granting of the motion to dismiss for the crime of attempted receiving stolen property is an offense in Ohio." *Id.* at 2. The State further indicated that "[t]he issue presented in this appeal is whether the Appellees can be convicted of Attempted Receiving Stolen Property when the property in question was in fact not stolen." *Id.* The assignment of error issue was not, in fact, the issue presented for review. There was no question that the Ohio Revised Code defines attempted receiving stolen property as a criminal offense. The real question was at what point does an individual's conduct constitute a completed attempt. The State's argument was that "[s]ince everyone is presumed to intend the reasonable and probable consequence of his conduct if the crime would result from the intent coupled with the overt act the attempt is complete." *Id.* at 4. Thus, the State's actual argument on appeal was that if the defendants had a criminal intent or state of mind and overtly acted on that intent, then they had engaged in criminal conduct forbidden by the statute.

77. *Id.* at 4-5.

78. *State v. Collins*, 40 Ohio St. 3d 706 (1988) (Moyer, C.J., Lochner & Holmes, J., dissenting).

79. The *Collins* common pleas court itself acknowledged that its decision is in direct contravention to the decision of the Brown County Court of Appeals in *State v. Platt*, C.A. No. 376, slip op. (Ohio Ct. App., 12th dist., no date in original): "It hardly needs expression that this court is not bound by the rulings of the Brown County Court of Appeals." *State v. Collins*, No. CR87-6059, slip op. at 9 (Lucas County Ct. C.P., Aug. 31, 1987). The *Collins* decision also conflicts with the language and rationale of Summit County Court of Appeals in *State v. Roper*, C.A. No. 8551, slip op. (Ohio Ct. App., 9th Dist., Dec. 7, 1977).

80. OHIO REV. CODE ANN. § 2913.51 (Baldwin 1986).

81. *Id.* § 2923.02.

82. See *supra* note 79.

1. *The Statutory Language*

Section 2913.51 of the Ohio Revised Code defines the offense of receiving stolen property. Section 2913.51(A) reads as follows:

No person shall receive, retain or dispose of property of another, knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense.⁸³

Section 2923.02 embodies the law of attempts. Section 2923.02(A) and (B) provide:

(A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct which, if successful, would constitute or result in the offense.

(B) It is no defense to a charge under this section that, in retrospect, commission of the offense which was the object of the attempt was impossible under the circumstances.⁸⁴

Under section 2901.03, "[n]o conduct constitutes a criminal offense against the state unless it is defined as an offense in the Revised Code."⁸⁵ Thus, the two statutes cited above are the limits of the state's authority to impose criminal liability for attempting to receive stolen property. The key issue, then, is whether the statutory enactments of the Ohio legislature in the area of attempts permit prosecution for attempting to receive stolen property.

The Lucas County Common Pleas Court and its Court of Appeals based their opinions on two specific phrases of section 2923.02. First, the courts stated that subsection (A) of the statute rejects only the defense of factual impossibility because it defines a criminal attempt as conduct which "if successful" would result in an offense. Defendants' counsel argued and the court agreed that successful conduct is the precise distinction between legal and factual impossibility.⁸⁶ In cases where the attempted criminal conduct is unsuccessful, the crime remains incomplete because the acts of the defendant are rendered unsuccessful by an intervening fact. In such cases, the crime is factually impossible.

The State and this Comment do not contest the court's judicial construction of section 2923.02(A). Factual impossibility is not a valid common law defense in Ohio. By incorporating the traditional definition of factual impossibility into the statute, the legislature codified the existing common law.

Second, the courts held that subsection (B) of section 2923.02 once again rejects the defense of factual impossibility. The language of the statute provides for the elimination of the *defense of impossibility* when "commission of the offense . . . was impossible under the circumstances."⁸⁷ Defendants successfully argued that the Ohio legislature did not eliminate the defense of legal impossibility in enacting section 2923.02(B). Instead, it was their position and the

83. OHIO REV. CODE ANN. § 2913.51 (Baldwin 1986).

84. *Id.* § 2923.02.

85. *Id.* § 2901.03.

86. See Brief of Defendant-Appellees at 9-10, *Collins*, C.A. No. L-87-319, slip op.; *Collins*, C.A. No. L-87-319, slip op. at 3; *State v. Collins*, No. CR87-6059, slip op. at 3-4 (Lucas County Ct. C.P. Aug. 31, 1987).

87. OHIO REV. CODE ANN. § 2923.02(B) (Baldwin 1986).

court's that the statute simply repeats its previous abrogation of factual impossibility.

The court of appeals' finding that section 2923.02(B) only eliminates factual impossibility is tenuous at best. The legislature specifically enacted both subsection (A) and (B). It had no reason to repeat itself. No further clarification was necessary to make the point that factual impossibility is not a defense to an attempt, especially in light of the courts' previous rejection of the defense.

Subsection (B) makes no distinction between legal and factual impossibility simply because the legislature intended to eliminate all impossibility defenses, including factual, legal, mixed fact and legal, and inherent impossibility. Subsection (B) reflects this intent through its clear statement that it is no defense that the attempt was impossible.

Furthermore, the "impossible under the circumstances" language of the Ohio statute draws from the language of other states with New York-type impossibility provisions. These state statutes explicitly provide that impossibility is no defense. They do not distinguish between factual and legal impossibility.⁸⁸ As previously stated, the attempt statutes of Illinois, Indiana, and Pennsylvania all essentially provide that "[i]t shall not be a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been *impossible* for the accused to commit the crime attempted."⁸⁹ The Kansas and Minnesota statutes provide that "[i]t shall not be a defense to a charge of attempt that the circumstances under which the act was performed . . . were such that the commission of the crime was not possible."⁹⁰ These statutes all rely on the language of both section 5.01 of the Model Penal Code and section 110.10 of the New York Penal Law and have been upheld as barring the impossibility defense.⁹¹ Thus, the Ohio attempt statute operates like the Pennsylvania and Kansas statutes by treating the impossible commission of a substantive crime as no defense. The effect of this approach is to abolish the legal impossibility defense.

2. Legislative Intent

The Lucas County Court of Appeals also erred in its determination of the legislative intent of section 2923.02. The court in *Collins* found the committee comment to section 2923.02 to be compelling evidence of the legislature's intent. The commentary states, in pertinent part:

88. See ILL. REV. STAT. ch. 38, para. 8-4 (1983); IND. CODE § 35-41-5-1 (1981); KAN. STAT. ANN. § 21-3301 (1981); MINN. STAT. § 609.17 (1982); MONT. CODE ANN. § 45-4-103 (1983); 18 PA. CONS. STAT. ANN. § 901 (Purdon 1983); WASH. REV. CODE § 9A.28.020 (1983).

89. 18 PA. CONS. STAT. ANN. § 901 (Purdon 1983). See also ILL. REV. STAT. ch. 38, para. 8-4 (1983); IND. CODE § 35-41-5-1 (1981).

90. KAN. STAT. ANN. § 21-3301 (1981); see also MINN. STAT. § 609.17 (1982).

91. Research revealed no cases in which the defendant successfully raised an impossibility defense in a jurisdiction that had a statute eliminating impossibility based on the New York-type attempt statute. See, e.g., *People v. Hrapski*, 658 P.2d 1367 (Colo. 1983); *State v. Gillespie*, 428 N.E.2d 1338 (Ind. Ct. App. 1981); *State v. Logan*, 232 Kan. 646, 656 P.2d 777 (1983); *State v. Korelis*, 21 Or. App. 813, 537 P.2d 136, *aff'd*, 273 Or. 427, 541 P.2d 468 (1975); *State v. Davidson*, 20 Wash. App. 893, 584 P.2d 401 (1978).

In order to prove an attempt to commit an offense, it must be shown that particular conduct directed toward commission of the offense took place and that such conduct, if successful, would constitute or result in the offense. The fact that hindsight shows that it would have been impossible to commit the offense under the circumstances is no defense. Thus, if the gun has a broken firing pin and misfires, this is no defense to a charge of attempted murder.⁹²

In its analysis, the court reasoned that the broken gun illustration in the committee comment "leaves no doubt that the legislature eliminated factual impossibility as a defense."⁹³ Since the Ohio legislature did not provide a clear renunciation of legal impossibility in the statute or its comments, the court was "constrained to hold that legal impossibility remains a viable defense in Ohio."⁹⁴

This reasoning, however, is flawed. The illustration in the committee comment is not on its face compelling evidence that legal impossibility remains a defense. There is no question that the legislature intended to abrogate the defense of factual impossibility. In fact, most attempt offenses are crimes that were factually impossible to complete. Cases involving legally impossible attempts are rare. Thus, it is no surprise that a legislature which decided to eliminate all impossibility defenses used as its one example an illustration of a factually impossible attempt. No inference can be made that the legislature intended to permit the defense of legal impossibility by its omission of that type of impossibility in the committee comment examples.

Even more revealing of the Ohio legislature's intent is a report on inchoate crimes by the Legislative Service Commission Staff to the Criminal Law Technical Committee which indicates that the statute was drafted and ratified with the purpose of allowing a prosecution or conviction for legally impossible attempts.⁹⁵ The report states:

[This division] is directed at the situation where the actor completes all the conduct necessary for commission of the offense, but because of a misapprehension of the circumstances, the intended harm does not result.

The effect of this paragraph is to eliminate the defense of impossibility. . . .

The Wisconsin Code section 339.32 attempts to spell this idea out in detail by providing "It is not a defense to a prosecution under this section that, because of a mistake of fact or law other than the criminal law, which does not negative the actor's intent to commit the crime, it would have been impossible for him to commit the crime attempted." . . . There is no need to detail this as did Wisconsin if as under the New York and Wisconsin codes the penalty for attempt is tied in with the penalty for the substantive crime.⁹⁶

This statement provides a clear indication of the legislature's intent. Although the statute was drafted to cover the case where a person receives stolen property that is not actually stolen, it does not explicitly state this proposition.

92. OHIO REV. CODE ANN. § 2923.02 (Commentary) (Baldwin 1986).

93. *State v. Collins*, C.A. No. L-87-319, slip op. at 3 (Ohio Ct. App., 6th Dist., Aug. 12, 1988) (LEXIS, Ohio library, Cases file), *appeal denied*, 40 Ohio St. 3d 706, 534 N.E.2d 849 (1988).

94. *Id.* at 4.

95. Legislative Service Commission Staff of Ohio, Report to the Criminal Law Technical Committee, Inchoate Crimes (Jan. 30, 1967) [hereinafter *Inchoate Crimes*] (on file with the Ohio State Law Journal).

96. *Id.* at 11.

It appears that the purpose of drafting the statute in general terms was to provide a flexible approach to attempts. The committee and the legislature wanted to avoid a conviction in a case "where the means employed are so entirely inadequate to accomplish the result that it negatives any probability of the fact that the actor is dangerous."⁹⁷

The report also shows that the legislature was concerned about neutralizing an individual when the individual's actions fully evidence a criminal intent. As the committee indicates, "There are good reasons for allowing a prosecution or conviction for attempt even though the intended result was in fact achieved."⁹⁸ This policy consideration is the basis for the drafting of Model Penal Code section 5.01(c) and Ohio Revised Code section 2923.02(B).

The Model Penal Code was available to the Ohio legislature when it adopted its statutory definitions of criminal attempts. The *Collins* court makes particular note of this fact and presents it as a justification for approving legal impossibility. Specifically, the court concluded that "the Ohio legislature can be presumed to have been aware of such changing trends in the law when it recodified the attempt statute in 1974. Yet, the legislature did not adopt clear language similar to the Model Penal Code . . . and thus . . . legal impossibility remains a viable defense."⁹⁹

The Ohio legislature, however, chose not to adopt the specific language of the Model Penal Code. The committee noted the criticism surrounding the Model Penal Code formulation on attempts because it only requires that the defendant take a "substantial step" towards committing a substantive crime and that his conduct strongly corroborate his criminal purpose.¹⁰⁰ The committee decided to avoid this tenuous area and instead proposed language which requires the defendant's conduct to demonstrate unequivocally his intent to commit the crime.¹⁰¹ The legislature simply wanted to prevent innocent or innocuous behavior from being subject to condemnation while allowing for the prosecution of a person who has manifested a dangerous character.¹⁰²

97. *Id.* at 12.

98. *Id.* at 9.

99. *Collins*, C.A. No. L-87-319, slip op. at 4.

100. *Inchoate Crimes*, *supra* note 95, at 13.

101. *Id.* at 3, 13.

102. Courts that permit a legal impossibility defense typically rely on the rationale that an individual should not be convicted of a crime merely because he had criminal thoughts. "[A]n immoral motive to inflict some injury on one's fellows coupled with a misapprehension about the content of the criminal law are not good reasons for conviction." Hughes, *One Further Footnote on Attempting the Impossible*, 42 N.Y.U. L. REV. 1005, 1022 (1967). See also the oft-criticized case of *United States v. Berrigan*, 482 F.2d 171, 184-90 (3d Cir. 1973), which held that there could be no conviction for attempting to send letters into and out of a penitentiary without the knowledge of the warden when the warden, in fact, knew of the letters. (*Berrigan* considered and rejected the Model Penal Code). In *Booth v. State*, 398 P.2d 863 (Okla. Crim. App. 1964), the defendant purchased goods he believed were stolen but in fact were not. The court permitted a legal impossibility defense in part because of its belief that "it is fundamental to our law that a man is not punished merely because he has a criminal mind. It must be shown that he has, with that criminal mind, done an act which is forbidden by the criminal law." *Id.* at 870-72.

3. *Judicial Interpretation*

Although the Ohio Court of Appeals for the Sixth District recognized legal impossibility as a viable defense, other Ohio appellate courts have interpreted the words "impossible under the circumstances" to mean "it is *no defense* that the defendant could not succeed in reaching his goal because of circumstances not known to him."¹⁰³

In 1980 in *State v. Platt*,¹⁰⁴ the Ohio Court of Appeals for the Twelfth District upheld a conviction for attempting to receive stolen property where the State could not prove that the items were actually obtained through the commission of a theft offense. The *Platt* court found that under Ohio Revised Code section 2923.02(B), the State does not have to prove that the items were stolen before the defendant can be convicted under sections 2913.51 and 2923.02. The court noted that "[w]hether or not a theft offense actually occurred does not matter; what matters is whether or not [the defendant] had cause to believe the items were stolen."¹⁰⁵ The court further found that 2923.02(B) permits the jury to be instructed that the defendant could be found guilty "if the facts and circumstances existing at that time . . . were such that a person of ordinary prudence and care believed' that the property was obtained through a theft offense."¹⁰⁶

Similarly, the Court of Appeals for the Ninth District acknowledged the state legislature's negation of legal impossibility in 1977 in *State v. Roper*.¹⁰⁷ In ruling on an appeal from an attempted murder conviction, the court held that the provisions of the Model Penal Code which eliminate legal impossibility as a defense to the charge of an attempt are directly carried over into the Ohio attempt statute.¹⁰⁸ The court also held that "when the consequences sought by a defendant are forbidden by the law is criminal, it is no defense that the defendant could not succeed in reaching his goal because of circumstances not known to him."¹⁰⁹

Furthermore, in 1982 in *State v. Holt*,¹¹⁰ the Court of Appeals for the Fifth District addressed the issue of the relationship between the Ohio complicity and attempt statutes. The court, in determining when section 2923.02 becomes operable, recognized the fact that section 2923.02(B) precludes any defense of impossibility be it legal or factual.

These three appellate decisions are in direct contravention to the holding of *Collins* and indicate that the *Collins* case was incorrectly decided. The *Platt* case involved the same type of attempt as *Collins* and was decided eight years prior. Yet, the *Collins* court refused to consider the decision.

103. *State v. Roper*, C.A. No. 8551, slip op. (Ohio Ct. App., 9th Dist., Dec. 7, 1977) (LEXIS, Ohio library, Cases file) (quoting *State v. Moretti*, 52 N.J. 182, 244 A.2d 499 (1968)) (emphasis added).

104. C.A. No. 376, slip op. (Ohio Ct. App., 12th Dist., no date in original) (LEXIS, Ohio library, Cases file).

105. *Id.*

106. *Id.*

107. *Roper*, slip op.

108. *Id.*

109. *Id.* (quoting *State v. Moretti*, 52 N.J. 182, 244 A.2d 499 (1968)).

110. No. CA-2074, slip op. (Ohio Ct. App., 5th Dist., Dec. 14, 1982) (LEXIS, Ohio library, Cases file).

C. *The Future Impact of Collins*

In cases such as *Collins*, the defendant's moral guilt is unquestionable. In fact, the defendants in *Collins* stipulated that they all believed that the items were stolen.¹¹¹ If the *Collins* decision stands and is adopted by other courts, an individual who has acted upon his intent to commit a crime will not be found legally guilty. Clearly a rejection and overturning of the *Collins* decision is necessary. The focus of the attempt statute should remain on the intent of the defendant rather than shift to the circumstances which prevented the completion of an unlawful act.

Presently, the *Collins* decision creates a great deal of conflict in the Ohio appellate courts over the defense of legal impossibility. If a defendant is tried in the sixth district rather than the fifth district, he may be able to have the attempt charges against him dropped. This result will allow a defendant who did everything possible to complete a criminal endeavor but failed because of a "legal technicality" to go unpunished. Criminal liability should not be determined by the district in which an individual is tried. The *Collins* decision must be vacated.

V. CONCLUSION

In the midst of a uniform national abrogation of the legal impossibility defense, Ohio has suddenly produced a decision which makes the future of the defense unclear. The *Collins* decision raises serious questions over the established interpretation of Ohio law on the offense of criminal attempts. Prosecutors may no longer be able to convict individuals for certain criminal attempts. Instead, it may only be necessary for defendants to prove that their criminal attempt was legally impossible to complete in order for them to avoid any liability.

As a result of the Ohio Supreme Court's refusal to hear the case, the lower courts have been left to themselves to interpret the statutory language and legislative intent of Ohio Revised Code section 2923.02. The real impact of *Collins* will not be felt until another defendant indicted for an attempt offense relies upon the court's holding in order to have the charges dismissed. As of yet, there is no indication as to how the other district courts will react to the *Collins* decision and resolve the conflict.

Thus, this Comment urges the courts to dismiss the *Collins* rationale. As one court has written, the impossibility defense is "so fraught with intricacies and artificial distinctions that the defense has little value as an analytical method for reaching substantial justice."¹¹² Yet, until the judicial construction of the Ohio statute is uniform and abrogation of legal impossibility is recog-

111. *State v. Collins*, No. CR87-6059, slip op. at 11 (Lucas County Ct. C.P., Aug. 31, 1987).

112. *State v. Moretti*, 52 N.J. 182, 189, 244 A.2d 499, 503 (1968) (quoted in Robbins, *supra* note 66, at 443).

nized, it will be impossible for Ohio courts to deal with the impossibility defense without substantial confusion.

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